Comparative Law, Law Reform and Legal Theory

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Zweigert and Kötz's *An Introduction to Comparative Law*, an English translation of which was published in 1977, has been described as 'indisputably one of the masterpieces of comparative law literature'.[1] Ten years on a second edition has appeared,[2] and although the authors have had to undertake revision in the light of recent developments, the structure of the work has remained substantially unchanged. Volume I provides an introduction to the nature of comparative law, and the world's major legal systems; the second volume attempts a comparative analysis of the law of obligations (contract, unjust enrichment and tort), with particular reference to Germanic, Romanistic and Anglo-American legal systems. As with the first edition, it is impossible to fault either the authors' scholarship or the elegance of the translation. Nevertheless, Zweigert and Kötz's *An Introduction to Comparative Law* reveals a number of theoretical problems which underlie the whole enterprise of comparative law.

Comparative law has suffered from 'a surfeit of methodology and self-inspection'.[3] Although comparatists have indulged in seemingly endless discussion not only over what comparative law is, but over whether it can be said to exist at all, the range of theoretical issues which comparative lawyers have traditionally considered tends to be narrowly circumscribed. In this article it is proposed to consider four wider questions which are raised by Zweigert and Kötz's work. (I) Is it possible to justify the role which comparative law is said to play in the field of law reform? (II) Does comparative law involve an acceptance of certain assumptions about the role of law in society? (III) To what extent is comparative law influenced by the political climate? (IV) What contribution, if any, can comparative law make in the realm of legal theory?

I

Although comparative law is not a new branch of legal study, it continues to play

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[1] Markesinis, *A Comparative Introduction to the German Law of Torts* (1986), 22.

[2] Zweigert and Kötz, *An Introduction to Comparative Law* 2 vols, trans Weir, 2nd edn (Oxford University Press, 1987). Subsequent references are to volume and page numbers only.

[3] Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 *LQR* 40, 59.

only a modest role, both in terms of research and law school teaching. Furthermore, the achievements of comparative law have not been universally acclaimed:

> I think it is fair to say that comparative law has been a somewhat disappointing field. For the most part it has consisted of showing that a certain procedural or substantive law of one country is similar to or different from that of another. Having made this showing, no one knows quite what to do next.[4]

In response to such criticisms, comparatists have sought to provide justifications for the study of comparative law, sometimes in rather extravagant ways,[5] but particularly by stressing that comparative law has an important role to play in the field of law reform. Maine, writing in the nineteenth century, asserted:

> It would, however, be universally admitted by competent jurists, that, if not the only function, the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law.[6]

Zweigert and Kötz agree that '[l]egislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law'.[7] By examining the law of other jurisdictions the law reformer can see how foreign legal systems approach and resolve common problems. However, for Zweigert and Kötz comparative law does not merely provide a reservoir of different solutions, it 'offers the scholar of critical capacity the opportunity of finding the "better solution" for his time and place'.[8] The evaluation of different legal systems is, therefore, central to 'better solution' comparative law.[9]

The immediate problem is obvious: on what basis are comparative lawyers qualified (or at any rate better qualified than lawyers whose studies are limited to their own country) to make evaluations of different legal systems? According to Zweigert and Kötz, it is the fact that comparative law is objective which provides the answer.[10] It will be seen, however, that—in the context of 'better solution' comparative law—the appeal to objectivity is wholly misplaced.

It is important to consider a distinction which Zweigert and Kötz themselves make between comparative law in its '*theoretical-descriptive* form', the principal aim of which is 'to say how and why certain legal systems are different or alike',[11] and comparative law in its '*applied* version' which aims 'to provide advice on legal policy'.[12] With regard to comparative law in its 'theoretical-descriptive form', the task of the comparatist is not unlike that of the legal sociologist, whose aim is the objective explanation of legal phenomena. In this respect comparative law might be thought to be a science, albeit a social science. (There are, of course, severe

[4] Shapiro, *Courts* (1981), vii. See also Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 *U Penn LR* 1121.
[5] See generally I: 13–27.
[6] *Village Communities in the East and West* 2nd edn (1872), 4.
[7] I: 15.
[8] Idem.
[9] See, for example, Jenks, *The New Jurisprudence* (1933) 66; Silberberg, (1973) 21 *Am J Comp L* 772, 775.
[10] I: 46.
[11] I: 11–12.
[12] I: 12.

difficulties in establishing the objectivity of both natural and social sciences.)[13]

However, even if it can be conceded that comparative law in its 'theoretical-descriptive form' is scientific and objective, it cannot automatically be concluded that comparative law in its 'applied version' can generate *values* which transcend subjectivity. But Zweigert and Kötz assert that comparative law, by revealing the ways in which legal systems are similar, helps 'to deepen our belief in the existence of a unitary sense of justice'.[14] Comparative law also points to 'the universality of legal science and the transcendent values of law'.[15] As for the goals of comparative law, they say:

> What we must aim for is a truly international comparative law which could form the basis for a universal legal science. This new legal science could provide the scholar with new methods of thought, new systematic concepts, new methods of posing questions, new material discoveries, and *new standards of criticism*.[16]

This approach owes something to the strand of the natural law tradition which suggests that comparative study provides one possible method for discovering moral principles which are both eternally valid and universal. Among Roman jurists, for instance, there was a tendency to treat *ius gentium*, which comprised 'the law applied by all nations',[17] as synonymous with *ius naturale* (that is, the law which ought to be observed by all mankind).[18] However, even if one places scepticism aside and concedes that universally accepted principles could be revealed through comparative study, it does not follow that such principles would have normative significance. Although the fact that a particular principle is to be found in a large number of different legal systems may suggest that it has some intrinsic value, comparative lawyers have not demonstrated that they can escape from the logical distinction between 'is' and 'ought'.

In any event, although Zweigert and Kötz think that one must look to comparative law in order to acquire the means by which the various solutions provided by the world's legal systems can be 'disinterestedly evaluated',[19] they are forced to recognize that, for the time being, the comparatist's 'standards of criticism are those used every day by all legal scholars'.[20] What are these standards? According to Zweigert and Kötz, an evaluation of the various solutions provided by different legal systems is to be made by considering which 'is best adapted to its purpose and operates most justly'.[21] Both of these basic criteria—purpose and justice—involve value-judgments.

[13] See the extracts from Popper, *Poverty of Historicism* (1957) and Myrdal, *Objectivity in Social Research* (1970) reproduced in Lloyd and Freeman, *Lloyd's Introduction to Jurisprudence* 5th edn (1985), 33–40, and Feldman, 'The Nature of Legal Scholarship', in a forthcoming issue of the *Modern Law Review*.

[14] I: 3.

[15] I: 20.

[16] I: 45. Emphasis added.

[17] *The Institutes of Gaius*, Part 1, cited by Nicholas, *An Introduction to Roman Law* (1962), 54.

[18] See Nicholas, op cit, 54–9.

[19] I: 22.

[20] I: 46.

[21] Idem.

Standards such as fairness, justice and common sense—which Zweigert and Kötz employ throughout *An Introduction to Comparative Law*—are notoriously indeterminate. It is easy enough to say that the law of obligations is 'founded on equity and justice',[22] or that '[t]he question raised by cases of mistake is which party should reasonably and fairly bear the risk of error',[23] but this does not help in providing objective answers to inherently controversial, and ultimately subjective questions.

The same sort of problems arise in relation to the notion of purpose. Nevertheless, it is a criterion which comparative lawyers have repeatedly adopted. Rheinstein, writing in the late 1930s, suggested that every rule and institution has to justify its existence under two inquiries:

> First: What function does it serve in present society? Second: Does it serve this function well or would another rule serve better?[24]

The function of many legal institutions is, however, debatable. What, for instance, is the function of the body of law regulating the consensual transfer of goods between individuals? Zweigert and Kötz state that '[c]ontractual justice . . . is the material function and principle of contract law throughout the world today'.[25] Quite apart from the fact that the concept of 'contractual justice' is so open-textured as to be almost meaningless, it is far from clear that this view is universally shared. Stein and Shand, for example, think that '[t]he essence of the modern Western law of contract is promise and agreement',[26] and others see the function of contract law in terms of the promotion of economic efficiency in voluntary exchanges.[27] This simple example indicates the extent to which attempts to identify the function of legal institutions depend on subjective interpretations, which cannot be divorced from value-judgments. In addition, even if in relation to specific rules and institutions the function is obvious, the approach adopted by 'better solution' comparatists fails to consider a more fundamental question, namely whether the function which the rule or institution serves is a worthwhile one.[28]

There is, therefore, nothing in Zweigert and Kötz's discussion of the methods of comparative law which suggests that the comparatist's 'conclusions about the proper policy for the law to adopt'[29] are any more objective than the conclusions of jurists who restrict themselves to the study of their own legal systems. Moreover, the failure of comparative law to provide an objective basis for evaluation is made patently clear when Zweigert and Kötz put the comparative method into practice. In their discussion of the law of contract, for example, they consider the question

[22] II: 255.
[23] II: 105.
[24] 'Teaching Comparative Law' (1938) 5 *U Chi LR* 615, 617–8.
[25] II: 7.
[26] *Legal Values in Western Society* (1974), 230.
[27] See Kronman and Posner, *The Economics of Contract Law* (1979).
[28] For further discussion of this point see section II, below.
[29] I: 6.

of whether an offer is binding on the offeror.[30] Under English law, a gratuitous contractual offer is freely revocable until it is accepted by the offeree. Conversely, § 145 of the German Civil Code (BGB), which provides that a person 'who offers to enter a contract is bound by the offer, unless he has excluded being so bound', renders the purported revocation of an offer ineffective. French law is generally regarded as taking a position falling somewhere between English and German law. In principle, the offeror may revoke an offer before it is accepted, but where the offeror has expressly or impliedly undertaken not to revoke before a certain time premature revocation will render the offeror liable in damages.[31]

As between these various solutions, what conclusion can the comparatist make? Is it a situation where 'the different solutions are equally valid', and 'a reasoned choice is hard to make', or can it be said that 'one solution is clearly superior?'[32] Zweigert and Kötz decide that '[t]he critic is forced to conclude that on this point the German system is best'.[33] In support of this conclusion they provide the following reasons:

> Experience shows that its [*ie* German law's] results are practical and equitable; the offeree can act with assurance in the knowledge that his acceptance will bring about a contract. It also makes sense to put the risk of any changes in supplies and prices on the offeror: it is he who takes the initiative, it is he who invokes the offeree's reliance, and so it must be for him to exclude or limit the binding nature of his offer, failing which it is only fair to hold him bound.[34]

There is nothing in this passage which suggests that the process of comparison has resulted in the authors' conception of common sense and fairness being anything other than subjective; their views are both personal and disputable. If a person sells a priceless Chinese vase of the Myng Dynasty at a low price thinking it to be a cheap imitation, should the seller be able to rescind the contract and demand the return of the vase on the basis that he was mistaken as to its value? Does common sense require that the seller of dangerous goods should be prevented from excluding liability to the buyer for death or personal injury? Is it just to impose liability on a person who has caused damage to another, though not through any fault? Zweigert and Kötz fail to show how comparative law can provide solutions to these controversial questions.

The argument that comparative law is incapable of generating objective standards of criticism does not mean that it has no role to play in the field of law reform. The study of foreign legal systems both tends to foster 'a greater degree of detachment, a greater scepticism about taking the assumptions and values underlying the English legal system for granted',[35] and offers 'a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist

[30] II: 35–44.
[31] See Nicholas, *French Law of Contract* (1982), 63–7.
[32] I: 46.
[33] II: 42.
[34] II: 42–3.
[35] Wilson, 'English Legal Scholarship' (1987) 50 *MLR* 818, 833.

who was corralled in his own system'.[36] However, comparatists cannot avoid the fact that their perception of the merits and demerits of different legal systems will be based on a range of (often unarticulated) value-judgments.

II

One of the virtues of comparative law is said to be that it 'liberates one from the narrow confines of the individual systems'.[37] However, this alleged liberation is superficial, if not illusory, because the comparative law agenda is largely conditioned by an uncritical attitude towards fundamental issues of social and economic organization. Comparatists seem content to regard law merely as a mechanism for the protection of spheres of individual activity, rather than as an instrument of radical policy. Tunc, for example, has described law as 'the tool which permits a maintenance of the balance between man's freedom and his social duties and powers'.[38] Zweigert and Kötz, for their part, recognize that Western law is designed 'to procure an orderly setting in which people can live peaceably together; since it is pledged to the idea that men living in freedom should develop themselves, it stops short of regulating their morals and attitudes'.[39] But, the Western legal tradition reveals a strong commitment to certain values, such as individual liberty, freedom of contract, and private property,[40] and while Zweigert and Kötz do not expressly endorse these values, they nonetheless take them for granted. Therefore, Zweigert and Kötz, and 'better solution' comparatists in general, almost inevitably reach conclusions which are conservative—in the sense of confirming and consolidating existing preconceptions about law and society—while presenting an image of being open-minded.

When considering the role that comparative law can play in the law reform process, Zweigert and Kötz state that the comparative lawyer must determine 'which solution is best suited *here and now to the national society as it is*'.[41] Rather than being a method for critically evaluating the bases of one's own legal system, and for formulating methods of social and legal change, 'comparative law suggests how a specific problem can most appropriately be solved *under the given social and economic circumstances*'.[42]

The model presented by Zweigert and Kötz is that society is like a train, with law as the engine. The comparatist is a mechanic, who has the job of finding the parts which will make the engine run more smoothly. Accordingly, proposals for reform either operate purely on the technical level—offering a simpler or more elegant way of achieving the same practical solution to a problem—or involve only tinkering with relatively minor points of detail.[43] As a result of limiting the scope of

[36] I: 15.
[37] Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 *ICLQ* 485, 492.
[38] *International Encyclopedia of Comparative Law* (1971), Vol XI: Torts, Ch 1: Introduction, para 22.
[39] I: 324.
[40] See Stein and Shand, passim.
[41] I: 22. Emphasis added.
[42] I: 12. Emphasis added.
[43] See, for example, II: 60.

their inquiry to narrow and often very tortuous issues, such as the revocation of offers, contracts for the benefit of third parties, or the recovery of damages in tort for pure economic loss, comparatists see their task as being essentially unpolitical, or neutral.[44] But 'better solution' comparative law is fundamentally conservative, because its emphasis on intricate points of detail avoids more challenging and radical questions about the role of law in society. Zweigert and Kötz's approach means that the most important question is not considered: is the train on the right track?

It is not being argued that comparative lawyers should necessarily be seeking to promote the overthrow of capitalism by devoting their energies to revealing and denigrating the bases of Western legal systems. Nevertheless, 'better solution' comparative law tends to gloss over the extent to which it is based on an uncritical acceptance of the ideological foundations of Western legal systems. This uncritical acceptance is difficult to reconcile with the comparative lawyer's claim to 'scientific exactitude and objectivity'.[45]

III

One of the dangers of comparative law is the temptation to mould the data with a view to substantiating a preconceived thesis.[46] This temptation is exacerbated by the fact that the legal material which comparative research provides is extremely diverse and malleable. Therefore, it is important to be aware that the way in which the comparative method is employed is to a large extent dependent on the end which the comparatist has chosen:

> Do you want to collect information for the sake of information? . . . Do you wish to support new legislation by showing that it has been used elsewhere? Do you wish to bolster up your own opinions by quoting others of like mind? . . . Do you wish to mitigate international 'tensions' by agreement on rules of international conduct? Do you wish to demonstrate the superiority of your own legal system by pointing out the motes in your neighbor's solution to problems? Do you wish to lay the foundation for a new world order?[47]

Zweigert and Kötz contend that one of the principal lessons to be learnt from comparative law is that 'the legal system of every society faces essentially the same problems, and solves these problems by quite different means though often with similar results'.[48] They go further when they state that 'as a general rule developed nations answer the need of legal business in the same or in a very similar way.

[44] I: 36. See also Lawson, 'Uniformity of Laws: A Suggestion' (1944) 26 *J Comp Leg* 16, 17 and 24.
[45] I: 44.
[46] Watson, *Legal Transplants* (1974), 12.
[47] Stone, 'The End to be Served by Comparative Law' (1951) 25 *Tulane LR* 325, 333.
[48] I: 31. For further elaboration on this point see Zweigert, 'Des solutions identiques par des voies différentes' (1966) 18 *RIDC* 17.

Indeed it almost amounts to a "*praesumptio similitudinis*", a presumption that the practical results are similar'.[49]

There are two angles from which Zweigert and Kötz's views can be questioned. In the first place, it is far from clear that there is general agreement as to what constitutes a problem. The Soviet legal system, for example, as a result of its ideological bases, faces the 'problem' of how to prevent citizens from acquiring unearned income through the purchase and resale of consumer goods at a profit. Among the techniques employed by Soviet law is the imposition of criminal liability for 'speculation'.[50] In Western legal systems, however, the resale of goods at a profit is regarded as legitimate economic activity. Indeed, within the context of EEC law, parallel importing is positively encouraged.[51] Furthermore, where it does seem that different legal systems have identified a common problem, appearances may be misleading. As Watson has pointed out:

> Variations in the political, moral, social and economic values which exist between any two societies make it hard to believe that many legal problems are the same for both except on a technical level.[52]

Secondly, even if it can be assumed that different legal systems do face the same problems, there are at the very least differences in detail in their resolution. Often divergence is more marked. For instance, although the legal problems posed by road accidents would seem to be common to all legal systems, there are significant variations even among the member states of the EEC. While the English law of tort continues to deal with road accidents through the tort of negligence, strict liability statutes for traffic accidents have been introduced in both the Federal Republic of Germany and France. Moreover, the results achieved by the legislation in these two countries are different, as the following points of comparison illustrate.

(i) According to § 7 of the German Road Traffic Act 1952 (as amended),[53] the holder (*Halter*) of a motor vehicle is strictly liable, subject to a narrow defence of *force majeure*.[54] Under the French *loi Badinter*[55] the defence of *force majeure* is expressly excluded.[56]

(ii) In German law damages will be reduced if the victim is guilty of contributory negligence,[57] whereas under French law the fault of the victim plays a very

[49] I: 36. The authors think that the presumption does not apply to 'topics which are heavily impressed by moral views or values, mainly to be found in family law and in the law of succession'. Can it be said that the law of contract, criminal law, and administrative law are unpolitical or neutral? See Devlin, *The Enforcement of Morals* (1965).

[50] Article 154 of the Criminal Code of the RSFSR. See Feifer, *Justice in Moscow* (1964), 55–6 and 73–5.

[51] See Horner, *Parallel Imports* (1987); Wyatt and Dashwood, *The Substantive Law of the EEC* 2nd edn (1987), 494–9.

[52] Op cit, 4.

[53] For an English translation see Markesinis, op cit, 469–74.

[54] § 7(2).

[55] Loi no 85–677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation, D 1985.371; *Rect* 588. For an account of the development of the law on motor accidents see Von Mehren and Gordley, *The Civil Law System* 2nd edn (1977), 600–89; Tunc, 'It Is Wise Not to Take the Civil Codes Too Seriously: Traffic Accident Compensation in France', in Wallington and Merkin (eds), *Essays in Memory of Professor F. H. Lawson* (1986), 71–85.

[56] Article 2.

[57] § 9.

limited role.[58] Generally speaking damages for personal injury will only be reduced in cases where the victim is guilty of inexcusable fault which is the sole cause of the accident.[59]

(iii) In Germany non-paying passengers, who are excluded from the scope of the 1952 Act, have to rely on the fault-based provisions of the BGB;[60] the French strict liability legislation on the other hand does not distinguish between passengers and other victims.

(iv) Damages under the Road Traffic Act 1952 are limited in two ways: there are statutory maxima,[61] and damages for pain and suffering are not available (although damages for additional loss, including pain and suffering, may be recovered under the BGB on the basis of fault).[62] There are no such restrictions in French law.

In view of the obvious differences between English, French and German law, it is at first glance perplexing that Zweigert and Kötz claim that 'one can almost speak of a basic rule of comparative law: different legal systems give the same or very similar solutions, *even as to detail*, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation'.[63] This assertion is especially surprising given that one of the bases of 'better solution' comparative law is that there are differences of substance between legal systems; otherwise, how would the comparatist be able to select from the solutions provided by various legal systems the one 'which is best adapted to its purpose and operates most justly'?[64]

Zweigert and Kötz's emphasis on similarity is related to political factors. As the authors admit, to the extent that comparative law forms part of 'the history of ideas', the attitudes and approaches of comparative lawyers are 'intimately connected with the basic intellectual tendencies of their age'.[65] Throughout this century trends in comparative law have been affected by world political events. Immediately after the First World War, for example, comparative law was seen as being capable of making a contribution to the effectiveness of the League of Nations, which it was hoped would lead to a general movement for the unification of law.[66] Unification, which became a rallying cry of comparatists during this period, was seen as a means of reducing international tensions. According to Lepaulle, 'divergences in laws cause other divergences that generate unconsciously, bit by bit, these misunderstandings and conflicts among nations which end with blood and desolation'.[67] With rather different aims in mind, American comparatists in the 1950s suggested that comparative law might be employed for

[58] Articles 3–5.
[59] Article 3(1).
[60] § 8a(1).
[61] § 12(1).
[62] § 16.
[63] I: 36. Emphasis added.
[64] I: 46.
[65] I: 48.
[66] Bedwell, 'The Present Value of Comparative Jurisprudence' (1919) 29 *Yale LJ* 509, 512–15. See also Gutteridge, 'The Value of Comparative Law' [1931] *JSPTL* 26; Schmitthoff, 'The Science of Comparative Law', (1939) 7 *CLJ* 94, 103.
[67] 'The Function of Comparative Law' (1922) 35 *Harv LR* 838, 857.

'the promotion of each of our basic democratic values'.[68] Hazard, having noted that Soviet law schools were using comparative law to attempt to establish the superiority of socialist law over bourgeois laws, advanced the following programme:

> It is possible to utilize comparative law in the American law schools for the same purpose, namely for perfecting American law and for convincing American law students of the desirability of their system of law. The field may be broadened to convince citizens of non-Soviet states of the preferability of the systems of law which are in effect in those states over the system of law in the Soviet sphere of influence. In this way the study of comparative law could become an instrument in the current ideological struggle by which those who protect the system of law, namely the future practitioners, prosecutors and judges, may develop at any early stage in their education an appreciation of the values which their system protects and a determination to see that these values are maintained.[69]

While it is unusual for the politics of comparative law to be overtly discussed by Western comparatists in this way, it is clear that the political climate has a pervasive influence on their attitudes and conclusions. The fact that there is currently a tendency for comparatists to highlight and acccentuate the ways in which European legal systems are similar is, at least in part, attributable to 'the political concept of a unified bourgeois Europe.'[70] Indeed, the attraction of the political goal of a united Europe is reflected in Zweigert and Kötz's prediction that 'the day may not be too far distant when the project of a *European Civil Code* will be undertaken'.[71]

The 'ideology of convergence'[72] can also be seen in the context of comparative legal history. Coing, for example, writes:

> One possible contribution which legal science can make to open the way for greater unity of law in Europe is to make us conscious of the rich heritage the European countries have in common.[73]

It is interesting, however, to consider the extent to which legal historians' views of the past depend on their perception of the present. Eörsi notes that, during the Hitler regime, 'the Germans . . . abandoned the Roman law and praised *Gesamthand*, the *Gewere* and other pre-feudal or feudal German institutions eulogizing them as timeless creations of the German genius and asserting the

[68] McDougal, 'The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order', (1952) 1 *Am J Comp L* 24, 27.

[69] 'Comparative Law in Legal Education' (1951) 18 *U Chi LR* 264, 273.

[70] Eörsi, 'Convergence in Civil Law?', in Szabó and Péteri (eds), *A Socialist Approach to Comparative Law* (1977), 45, 49. Comparative law is seen as having a role in the process of European integration. For example, see Cappelletti (ed), *New Perspectives for a Common Law of Europe* (1978); Mouly, 'Le Droit peut-il favoriser l'intégration européene?' (1985) 37 *RIDC* 895.

[71] I: 183. The idea of a European Civil Code is not new; indeed the authors made the same prediction in the first edition (I: 176).

[72] Eörsi, loc cit.

[73] 'European Common Law: Historical Foundations', in Cappelletti, op cit, 31. See also, Robinson, Fergus and Gordon, *An Introduction to European Legal History* (1985), vii.

uniqueness and prevalence of the German law development'.[74] It was after the defeat of the Nazis that German legal historians reconsidered the extent to which the legal systems of Western Europe share a common legal heritage.[75] Comparative legal history has, therefore, painted two very different pictures of German legal development. It is as though 'there were two Middle-Ages available for the same period and space depending on the current politics: one that was peopled by German giants and another inhabited by men of Reason: Europeans'.[76]

Whatever the merits of these divergent views of European legal history, the current concentration on the common origins of Western legal systems does not simply result from the data unearthed by post-war research.[77] The way in which the available data is interpreted depends on a variety of factors, including political and ideological considerations. Zweigert and Kötz's emphasis on the similarity of European legal systems should be seen in this light; it is a response to the 'ideological requirements in present-day Western Europe'.[78]

IV

It is widely accepted that, as a consequence of the immense volume of material available to the comparatist, comparative law is almost necessarily unsystematic.[79] 'Better solution' comparative law, however, also has a tendency to be atheoretical, notwithstanding the fact that the comparatist's conclusions have implications for theories of law and of legal development. 'Better solution' comparative law, by focusing on the evaluation of different systems, stumbles upon the broader theoretical issues only by accident, and randomly.

For example, there are within *An Introduction to Comparative Law* different perspectives on the nature of judicial discretion in the adjudicative process. At some points Zweigert and Kötz suggest that courts have open-ended discretion to create legal rules and principles, notwithstanding the existence of a legislative framework. So, they have 'no doubt at all that in large areas of French private law *the rules are a pure fabrication of the judges*, often with only the most tenuous connection with the text of the Code civil'.[80] Similarly, in their discussion of vicarious liability under German law, Zweigert and Kötz recognize that the German courts have produced results which could not have been envisaged when the BGB came into force. According to § 831 BGB, where an employee has, in the exercise of the function assigned to him, negligently caused damage to a third party, the employer is nevertheless not vicariously liable if he can establish the exculpatory proof (by showing that he was not at fault in selecting, training and supervising the employee). However, the courts have circumvented § 831 by allowing the victim of an employee's negligence to sue the employer on the basis of

[74] Op cit, 50.
[75] See Koschaker, *Europa und das römische Recht* (1947).
[76] Eörsi, op cit, 51.
[77] See Vinogradoff, *Roman Law in Medieval Europe* (1909).
[78] Eörsi, op cit, 53.
[79] Watson, *Legal Transplants* (1974), 11.
[80] I: 130. Emphasis added.

a contractual duty of care.[81] So, the *Bundesgerichtshof* allowed a child who slipped on the floor of a self-service store while accompanying her mother on a shopping expedition to recover damages from the occupier on a contractual basis.[82] Zweigert and Kötz note that the contractual theory is used by the courts simply 'in order to get round' the policy of § 831 BGB.[83]

For the most part, however, Zweigert and Kötz seem content to accept that judges have no more than limited discretion within the established framework of formal rules and principles. Even where the courts employ flexible concepts the judiciary's action is regarded as being circumscribed by the framework. For instance, Zweigert and Kötz note that since the introduction of compulsory indemnity insurance for motorists the English courts—in road accident cases—have had a tendency to twist the tort of negligence in order to make the insurers pay. But, they go on to say that 'cases constantly crop up such that with the best will in the world one cannot find any negligence'.[84]

An atheoretical approach fails to maximize comparative law's potential. By employing comparative law as 'a substitute for the experimental method, not a very satisfactory substitute, but one pressed upon us by the impossibility of putting laws and nations in test tubes and bubble chambers',[85] one can come to understand more about the nature of law, of legal institutions, and of legal development. For example, Shapiro—through the use of comparative material—has examined and questioned certain basic assumptions which are made about the nature of courts with the purpose of moving towards 'a more general theory of the nature of judicial institutions';[86] on the basis of extensive research in the field of comparative legal history Watson has attempted to advance a general theory of legal change.[87]

Within this general approach—comparative law as 'a substitute for the experimental method'—the comparatist can test hypotheses of differing degrees of generality by reference to very varied material. Accordingly the data which comparative law provides can be of some assistance in verifying (or falsifying) legal theory. How does Hart's concept of law stand up to the *Cour de cassation*'s interpretation of article 1384(1) of the French Civil Code? Can a realist theory of law explain judicial pronouncements such as Lord Roskill's confession in *President of India* v *La Pintada Compagñía Navigación SA* that he reached his decision 'with both regret and reluctance'?[88] In the light of the Soviet law of tort, the conceptual structure of which is borrowed from Roman law,[89] what is the relative importance of political ideology and legal culture in the evolution of law? It is noteworthy that

[81] § 278 BGB makes the employer strictly liable for the employee's fault in these circumstances.

[82] BGHZ, 66, 51; cited at II: 147. For an English translation of the case see Markesinis, op cit, 434–8.

[83] II: 147.

[84] II: 362.

[85] Shapiro, op cit, vii.

[86] Idem.

[87] See 'Legal Change: Sources of Law and Legal Culture' (1983) 131 *U Penn LR* 1121, in which Watson summarizes his thesis and replies to his critics.

[88] [1985] AC 104, 111. For a discussion of this case see Watson, 'A House of Lords' Judgment, and Other Tales of the Absurd' (1985) 33 *Am J Comp L* 673.

[89] Rudden, 'The Soviet Law of Tort' (1967) 42 *NYULR* 583, 604. See also Ioffe, *Soviet Law and Soviet Reality* (1984), 9.

certain theories of law—notwithstanding the fact that they are presented at a very high level of abstraction and intended to be of general application—appear to be conditioned, to a greater or lesser extent, by the legal traditions which spawned them. For instance, the writings of many American jurists, ranging from the American Realists to Ronald Dworkin, show numerous hall-marks of the common law tradition. Conversely, Kelsen's pure theory of law reveals attitudes which are typical of civil law systems.

Zweigert and Kötz's *An Introduction to Comparative Law* cannot be criticized simply because of the absence of a jurisprudential framework. Nevertheless, one of the disappointing features of Zweigert and Kötz's work is the failure to explore the jurisprudential implications of their researches. If comparative law provides limited support for a variety of theories, rather than unequivocally endorsing any particular philosophy, this might be thought to reveal something about both the complex nature of law, and the limited explanatory power of any model or theory which is designed to illuminate the essence of legal phenomena.

Conclusion

Some of the claims which Zweigert and Kötz make on behalf of 'better solution' comparative law are difficult to substantiate. This is perhaps not very surprising since it is unrealistic to expect a single branch of legal scholarship, especially one as elastic and ill-defined as comparative law, to represent the acme of legal scholarship, and to provide the ultimate panacea for perceived defects in legal education. Indeed, Watson has even gone so far as to question the academic respectability of 'better solution' comparative law. While conceding that the making of comparisons has educational and practical merit, he argues that, since there is nothing distinctive about the so-called comparative method, 'better solution' comparative law is not worthy of being described as an academic discipline in its own right.[90] Ultimately, however, questions such as whether comparative law can be classified as a method, a science or an academic discipline are somewhat sterile.[91] If it is accepted that comparative law has some merit, the label one attaches to it is largely a matter of indifference.

It is not possible in the present context to explore in any detail the implications of the criticisms of 'better solution' comparative law which have been made in this paper. Nevertheless, the foregoing discussion naturally leads to the conclusion that comparative law in its 'applied version'—to the extent that it attempts to determine the proper policy for the law to adopt—is faced by very serious, if not insoluble, theoretical problems. This is not to say, however, that comparative law—in one form or another—has no contribution to make to legal scholarship and education. There are three points to be made by way of conclusion.

First, without having to become involved in arguments about the nature and worth of comparative law, there is something to be said simply for the study of

[90] *Legal Transplants* (1974), 1–9.
[91] Schmitthoff, op cit, 94–5.

foreign law. As a result of the inflated claims made on comparative law's behalf (such as Zweigert and Kötz's assertion that 'legal science . . . is sick, and comparative law can cure it'[92]) it is easy to lose sight of this. Despite the expansion of the law school curriculum in recent years undergraduate legal studies tend to be parochial since rarely does the syllabus extend beyond the law of England and Wales. If the aim of legal education is to foster 'not the mechanical approach of a legal technician, but a broader vision'[93] insularity is to be avoided. According to this view the acquisition of an understanding of foreign legal systems—even if rather superficial and unsystematic—is a worthwhile aim in itself.

Secondly, it should not be forgotten that there are numerous conceptions of comparative law. In particular, there is the conception of comparative law as a form of applied jurisprudence. This approach has been championed by Watson, for example, who considers that 'in the first place Comparative Law is Legal History concerned with the relationship between systems', and 'in the second instance . . . Comparative Law is about the nature of law, and especially about the nature of legal development'.[94] Comparative law—by virtue of being the closest approximation within the legal sphere to the experimental method—can help to illuminate the nature of legal phenomena.

Thirdly, and perhaps most interestingly, comparative law can reveal—more vividly than the study of a single legal system—the relationship between law and political and moral values. The importance of this relationship is suggested by the foreignness of the laws of other countries. For example, in 1962 the French *Cour de cassation* allowed the owner of a horse which was killed through the defendant's fault to recover damages not only for the cost of replacing the horse, but also for pain and suffering.[95] Under Soviet law owners of motor-vehicles 'shall be obliged to compensate harm caused by a source of increased danger unless they prove that the harm arose as a consequence of insuperable force or the intention of the victim'.[96] Nevertheless, Soviet motorists cannot take out third-party liability insurance.[97] On the foundation of § 242 of the BGB—which simply provides that obligations should be performed 'in such manner as good faith requires, regard being paid to general practice'—the German courts have erected a complex doctrinal structure.[98] Although many of the doctrines which have been incorporated into German law through § 242 are familiar to Anglo-American lawyers, in certain areas the German judges have been much more interventionist than the judiciary in common law jurisdictions. For example, 'English courts are less ready than German courts to hold that altered circumstances have brought a contract to an end'.[99]

[92] I: 30.
[93] Goode, 'The Academic Stage of Legal Education: A Non-Vocational View' (1988) 85/13 *LS Gaz* 12, 13.
[94] Op cit, 6–7.
[95] Civ, 16 janvier 1962, D 1962.199; cited at II: 312.
[96] Article 90 of the Fundamental Principles of Civil Law (1961); article 454 of the Civil Code of the RSFSR.
[97] See Barry, 'The Motor-Car in Soviet Criminal and Civil Law' (1967) 16 *ICLQ* 56, 74.
[98] See Horn, Kötz and Leser, *German Private and Commercial Law* trans Weir (1982), 135–45; Dawson, *The Oracles of the Law* (1968), 461–79.
[99] II: 227.

Although 'better solution' comparative law involves the evaluation of different legal systems, this does not mean that there is an express recognition of the value-laden nature of law and legal institutions. Indeed, the assumptions of comparative law in its 'applied version' are that legal questions are essentially technical, and that there are significant areas of law which are not impressed with strong political or moral views. These assumptions tend to be fuelled by the geographical ambit of comparative studies. Volume II of Zweigert and Kötz's *An Introduction to Comparative Law*, for example, is confined to a discussion of the law of contract, tort and unjust enrichment in Western legal systems. Within these systems there are significant differences which reveal conflicting approaches to moral questions. Nevertheless, in terms of their foundations, the legal systems of the Western world are relatively homogeneous. By widening the geographical scope of comparative law fundamental aspects of our own legal system—which are generally taken for granted—may be seen in a different light. Comparative law can help to demonstrate the extent to which the form and substance of any legal system are not 'natural', but result from the implementation of moral and political values.